# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD FIRST REGION

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HARVARD UNIVERSITY

Employer<sup>1</sup>

and

Case 01-RC-079519

NEW ENGLAND COALITION OF PUBLIC SAFETY

Petitioner

# DECISION AND ORDER<sup>2</sup>

Harvard University operates a non-profit educational institution in Cambridge, Massachusetts. The Union seeks to represent a unit of 17 sergeants employed by Harvard University in its Police Department. Harvard University asserts that all of the sergeants are statutory supervisors and that the Petition, therefore, should be dismissed. The Union

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

<sup>&</sup>lt;sup>1</sup> The name of the Employer appears as amended at the hearing.

<sup>&</sup>lt;sup>2</sup> Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

asserts that the sergeants are nonsupervisory employees. I find that the petitioned-for sergeants are statutory supervisors and shall dismiss the petition.

# Background

The Harvard University Police Department (HUPD) is responsible for the safety of students, faculty, and researchers at the University. It operates around the clock, 365 days a year. HUPD operates from its headquarters at 1033 Massachusetts Avenue in Cambridge.

HUPD is headed by Chief of Police Francis Riley. The sergeants at issue are employed within three separate sections of HUPD: Operations, Criminal Investigations, and Administrative and Finance. Each of these sections is headed by a deputy chief who reports to Chief Riley. Deputy Chief James Claiborne is responsible for Operations. The Operations group employs 12 sergeants, three of whom are shift commanders. The Criminal Investigations Department is headed by Deputy Chief M. Giacoppo. This department includes two sergeants dedicated to dignitary and VIP protection and special events, as well as one sergeant dedicated to criminal investigations. Finally, an administrative group is headed by Deputy Chief for Shared Services and Labor Relations Kevin Regan. Two sergeants work in the administrative branch of this group. These two sergeants report to the Manager for Administration and Finance, Kerry Unflat, who reports, in turn, to Regan. Regan testified that all of the sergeants have the same functional authority, although they have different duties and responsibilities.<sup>3</sup> There are currently no lieutenants or captains in the department.<sup>4</sup>

HUPD employs about 60 sworn police officers. The police officers are represented by the Harvard University Police Association and are covered by a collective-bargaining agreement between their union and the University.

# **Sergeants who work in Operations**

The Operations Department, which is headed by Deputy Chief Claiborne, is a 24/7 operation. Its sergeants and police officers generally work in three shifts: a day shift from 7 a.m. to 3 p.m., an evening shift from 3 p.m. to 11 p.m., and a midnight shift from 11 p.m. to 7 a.m. There is also a 6:30 p.m. to 2 a.m. shift for police officers, although no sergeants work that shift.

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<sup>&</sup>lt;sup>3</sup> Regan was the only witness who testified on behalf of the University. Regan has been the Deputy Chief for Shared Services and Labor Relations for the last two years. From 2002 to 2009, he was Chief of Staff in charge of the Operations division. In that capacity he supervised the uniformed police officers and sergeants in the Operations group.

<sup>&</sup>lt;sup>4</sup> HUPD once employed at least seven lieutenants, but that layer of supervision was eliminated during a reorganization in 1999, when all of the lieutenants were laid off.

With two exceptions, the sergeants work out of the HUPD headquarters in Cambridge. Three of the petitioned-for sergeants are shift commanders, i.e., the officer in charge for their shift. Sergeant Amy DiVirgilio is the shift commander for the day shift. Sergeant Scott Simas is the shift commander for the evening shift. Sergeant Norma Rodriquez-Simas is the shift commander for the midnight shift. Six sergeants are in charge of teams of police officers who patrol a particular geographic area, sometimes referred to as community policing teams. It appears that Sergeant Wilmon Chipman, who works days, and John O'Kane, who works the midnight shift, are not assigned to cover a particular geographic area. One sergeant, James Pignone, is the designated detail officer.

The police officers are assigned to teams that cover one of the geographic areas. Nine police officers are assigned to the Longwood team, but the record does not reveal how many police officers are assigned to each of the other geographic areas. It appears from the testimony of Sergeant Kotowski, who is the team leader for the Longwood area, that, on any given shift, there must be a minimum of five police officers in Cambridge and two in Longwood. It appears that the police officers in Operations report to the sergeant who is the team leader for their geographic area. The record does not reveal whether any police officers report directly to the three shift commanders or which police officers, if any, report to Chipman or O'Kane, who do not appear to be responsible for a particular geographic area.

# Assignment of police officers to their shifts and geographic areas

The sergeants have no control over which shift or days of the week the police officers work. Pursuant to Article 5 of the collective-bargaining agreement covering the police officers, HUPD conducts an annual bidding process during which police officers bid on vacancies for the various shifts available. The shift assignments are filled by seniority. By contract, when a vacancy occurs within a shift, the Chief may offer the vacancy to volunteers within the shift. If there are no volunteers, the vacancy is filled by the least senior officer within the work shift.

Police officers are deployed by geographic area so that they become familiar with the students, faculty, and staff in a particular area of the campus. For the most part,

<sup>&</sup>lt;sup>5</sup> Sergeant Robert Kotowski, who covers the Longwood geographic area, works in Longwood and does not report to the HUPD headquarters in Cambridge. Regan testified that Sergeant Kevin Bryant, who covers the Allston area, reports to "both places," but the record does not reveal what those places are.

<sup>&</sup>lt;sup>6</sup> Sergeants Robert Kotowksi, Dominic Sardo, Julie Davie, Kevin Bryant, Daniel Brown, and Gordon Gilles are each assigned to cover a certain geographic area for either the day or evening shift. The geographic areas that their teams cover are Longwood, Harvard Yard, North Yard, River/Radcliffe, and Allston.

<sup>&</sup>lt;sup>7</sup> Regan testified only that some of the other teams are not staffed to the extent of the Longwood team.

police officers are assigned to a geographic area for a year, unless there is a need for a change. Regan testified that, to his knowledge, police officers are assigned to geographic areas "through consultation with the sergeants" and Deputy Chief Claiborne, that the Deputy Chief makes the final determination as to where officers go, and that Claiborne may overrule the sergeants. Sergeant Kotowski testified that the Chief or his designee "decide" the geographic sectors. As for the assignment of particular officers to a geographic area, Kotowski testified that the sergeants in charge of the community policing teams hold a meeting, in conjunction with the Deputy Chief, in which they "draft" the police officers and decide who goes where. These meetings usually occur just after the bidding process for shifts has been finalized. Ultimately, there may be changes to each team sergeant's request when the process is finalized at a higher level of the administrative chain.

In addition to being assigned to a community policing team covering a certain geographic area of the campus, some police officers are further assigned to a fixed location within the geographic area covered by their team. Regan testified that some officers are assigned to cover a certain dormitory (referred to a "house") within their geographic area. He testified that the sergeants, in conjunction with Deputy Chief Claiborne, assign police officers to the houses after the shift bidding process is completed and that these assignments usually last a year.

# Daily assignment and direction

At the beginning of each shift, the shift commander or another sergeant conducts roll call with the police officers before they head out to their assignments. Regan testified that, at roll call, the sergeants inspect the officers to make sure they are in appropriate uniform. They discuss events in the last 24-48 hours and discuss notes about matters that "somebody" wants the sergeants to discuss, for example, the need for directed patrols. At roll call, the sergeants make assignments such as designating which officer will patrol by vehicle, on foot, or by mountain bike, and which officer will cover a stationary post.

Sergeant Chipman, who works the day shift, testified that he begins each shift by speaking to the sergeant from the previous shift, who notifies him of any events from the previous shift that he needs to discuss with the police officers. He prints out any reports from the last 24 to 48 hours. He prints out the daily roster, which appears to show

<sup>&</sup>lt;sup>8</sup> As noted above, Regan used to be the Chief of Staff for Operations but has not worked in Operations for two years and has not participated in this process since he left Operations.

<sup>&</sup>lt;sup>9</sup> By this he meant, presumably, that the Chief or his designee determines the parameters of the geographic sectors.

<sup>&</sup>lt;sup>10</sup> Kotowski testified that, unlike the other teams, there tends to be a permanent group of officers assigned to his Longwood team. With one exception, he has had the same officers on his team since he became a sergeant in 1996.

everyone's geographic assignment for the shift. The daily roster is prepared by an "administrative" employee, Jamie Fox, and Chipman testified that he has no input into it, although he may make changes in it during the course of a given shift. The daily roster may include remarks, e.g. that two officers are needed to cover an "Occupy" protest in Harvard Yard at a certain time and place. Chipman may tell the officers who cover Harvard Yard that they are responsible for covering that situation. Chipman also prints out the "roll call script," which he is required to read at roll call. The roll call script, which changes from day to day, includes information that the Deputy Chief wants the sergeant to impart to the officers. It may tell them that there is a special event that requires extra coverage and how many officers will be assigned to provide the extra coverage. The script may notify the officers if there are any "report" issues and how they should be corrected. It may notify the officers of any upcoming events, e.g. commencement, for which officers must be available and during which they may not take time off.

Regan testified that there are additional types of assignments that sergeants make. Sergeants may assign officers to cover a certain area because something is going on or they may ask a patrol officer to cover a meeting. Chipman testified that assignments within a geographic area are made by seniority, that seniority is a big issue for police officers, and that, all else being equal, seniority wins out. Sometimes assignments within a geographic area are noted on the schedule before he arrives and sometimes not. Sometimes an officer calls him to say he wants to work in a certain area that is open and Chipman will agree, because no other officer wants to cover the area. If there is an assignment that no officer has volunteered for, Chipman picks the least senior officer to go.

During the course of a shift, the sergeants communicate with the police officers by radio and telephone. They may redeploy officers from one geographic sector to another, for example, in response to a demonstration in Harvard Yard. The sergeants have authority to move officers from one part of a geographic area to another based on changed circumstances, e.g., if more officers are needed for crowd control at a certain location. Chipman testified that he would let the Deputy Chief know "if things were getting bigger than anticipated."

Regan testified that, in making assignments, for example, sending an officer to a meeting or to handle a problem at a certain house, the sergeants determine who is the best or more thorough officer or who would do a better job in solving a problem. In some situations, such as a call about a sexual assault, the sergeant would send a police officer who has had training in dealing with sexual assault.

<sup>&</sup>lt;sup>11</sup> A sample roll call script submitted into evidence notified officers, for example, that their reports about vandalism should be more specific in certain ways.

Sometimes the sergeants make assignments that the police officers deem undesirable. On one occasion at roll call, a sergeant assigned an officer to have a new police officer from the Cambridge Police Department ride with him so he could become familiar with the campus and the type of calls they handle. The HUPD police officer did not want to have the Cambridge police officer ride with him and created a scene, requiring two sergeants to intercede.

Regan testified that, very rarely, police officers are engaged in high speed chases. The sergeants make a determination whether, in their professional judgment, the chase has become unsafe and should be called off. Regan was aware of at least one instance where that happened.

#### Granting requests for time off

Regan testified that sergeants have authority to grant the police officers' requests for time off, including vacation requests, requests to leave early, and requests to swap shifts. Chief Riley has established a minimum staffing level for the Department, which the sergeants may not lower. So long as an officer's request for time off does not impact the minimum staffing requirements, the sergeants may approve these requests without consulting their superiors. Sergeant Kotowski testified, however, that he does not have authority to approve a vacation day if the request is made within 24 hours of the affected shift, even if minimum staffing requirements would not be impacted. Requests made with only 24 hours notice must be approved by the Deputy Chief.

# Authorizing overtime

Regan testified that when police officers call in sick or are otherwise unavailable for their scheduled shifts, a sergeant must arrange to fill the vacancy. The sergeants send out a page offering overtime for the shift. Regan testified that a sergeant in his administrative group, Sergeant Fay, has authorized Officer Vasilyev, who works on the administrative side of the Department, to work overtime, without seeking Regan's approval. Regan testified that if no officer accepts the offer of overtime and the situation requires it, sergeants may order officers from the previous shift to stay over. According to Regan, the selection of which officer is ordered to stay over is totally within the sergeants' prerogative and may depend on how many hours the officer has worked that day or whether the officer has something scheduled for the following day.

Sergeant Chipman testified that he may not authorize overtime pay, which must be authorized by Deputy Chief Claiborne. If an officer calls to say he will not be working and his or her absence would bring the shift below the pre-set minimum staffing

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<sup>&</sup>lt;sup>12</sup> Regan testified that sometimes officers complained to him about assignments and he spoke to the sergeant about it. This happened, presumably, during the time Regan was head of Operations.

<sup>&</sup>lt;sup>13</sup> According to Sergeant Kotowski, there must be at least five police officers in Cambridge and two in Longwood.

requirements, the sergeants call Claiborne, and he authorizes the overtime. Chipman testified that he cannot choose which police officer will get the overtime work. The overtime is distributed, consistent with the collective-bargaining agreement, by use of a list, by hours of overtime worked, so that the distribution is fair and equitable. As for involuntary overtime, Chipman testified that there have been situations where he had to hold over an officer to work another shift, but he did so only after consulting the Deputy Chief.

Sergeant Kotowski testified that if an officer calls in, so that the shift is below minimum staffing levels dictated by the Deputy Chief, there is an authorization to offer overtime, based on the numbers. The Deputy Chief has told the sergeants that it is a given that if there are fewer than five officers in Cambridge and two in Longwood, overtime will be used.

#### Assignment of detail work

Paid details are work assignments that are outside the police officers' scheduled tours of duty. Details are usually scheduled in advance. Paid details are often offered due to traffic needs, public safety around construction zones, athletic events, or other special events on campus. There are anywhere from 15 to 40 detail sites on any given day. The details are often paid for by a third party, such as a construction company. Details are paid at a higher rate prescribed by the collective-bargaining agreement.

Paid details are assigned by the paid detail officer, i.e., a patrol officer who is supervised by a sergeant. The detail sergeant is currently Sergeant James Pignone. Pignone or any other sergeant may determine that there is a need for a detail. If a police officer files a hazardous condition report, Pignone goes to view the site and determines if it requires a detail. Pignone testified that HUPD has pre-determined that certain types of details are a priority, such as a detail related to a high-priority dignitary or an undergraduate party involving alcohol. For situations that "fall out of protocol," Pignone usually consults with the Deputy before he makes any decision about the need for a detail. If Pignone believes that there is a hazard, he assigns an officer from the current shift to work it until the arrival of the off-duty officer who has accepted the detail assignment. Pignone testified that he usually consults with the Deputy Chief if he decides that he needs to assign someone from a shift to a detail.

Pursuant to the collective-bargaining agreement, details are to be distributed as equitably as practicable. The HUPD Policies and Guidelines Manual provides that detail assignments will be assigned by hours, lowest to highest. The manual sets forth in detail how the number of hours and an officer's place on the list is calculated. There is a separate protocol for emergency details, i.e., those given out with less than six hours notice. Pignone testified that he sends a text message about emergency details to any

<sup>&</sup>lt;sup>14</sup> The record does not reveal anything about the role of this patrol officer in the assignment of details.

officer who has signed up to be on the emergency detail list. Emergency details are awarded by seniority, on a rotating basis.

# The sergeants' accountability for the work of the officers under them

HUPD's Policies and Guidelines Manual provides that "Supervisors are responsible and accountable for the actions or inactions of the officers and others working under them." Regan testified that, when Policies and Guidelines Manual refers to "supervisors" or "shift supervisors," that refers to sergeants.

With respect to the accountability of sergeants for what happens on their shift, Regan testified that sergeants have been reprimanded for actions on their watch. Regan testified to the following examples of such discipline: A sergeant was suspended for not following through on his supervisory duties when a police officer next to him eavesdropped on a phone call. A sergeant was reprimanded for not following the procedure for fingerprinting and booking prisoners. Two sergeants were given warnings for failing to report to the scene when shots were fired. <sup>15</sup>

The University also submitted into evidence a July 2011 memorandum from Chief Riley to a sergeant in which Riley addressed the fact that several officers had complained about the sergeant's condescending, disrespectful, abrasive demeanor toward them. Chief Riley wrote that additional discipline action could be taken against the sergeant if he failed to meet the expectations outlined.

#### **Sergeants who work in the Criminal Investigations Department**

## **Sergeants who arrange security for "VIPs"**

The Criminal Investigations Department is headed by Deputy Chief M. Giacoppo. Two sergeants in this department, Richard Mederos and Denis Downing, report to Giacoppo. These two sergeants are responsible for arranging for security for visiting VIPs and dignitaries and for special events such as commencement or the inauguration of the president of the University. Visits by dignitaries and special events are frequent at Harvard. When Sergeants Mederos and Downing receive notice that a dignitary will be visiting the campus, they arrange for a protection detail for the visitor. In some cases, they coordinate with other entities that may also provide security for the dignitary, such as the U.S. State Department, military security groups, the C.I.A., the Cambridge Police Department, or the dignitary's private security agents.

<sup>16</sup> For example, in 2012, HUPD has provided security for dignitaries such as former President Bill Clinton, the Queen of Jordan, the Prime Minister of Ireland, two Supreme Court Justices, three former Secretaries of State, and the presidents of various countries, as well as security for celebrities such as Lady Gaga, Oprah Winfrey, and actors Claire Danes and Cuba Gooding.

<sup>&</sup>lt;sup>15</sup> No documentary evidence of these three disciplinary actions was submitted into the record.

One of the duties of Sergeant Mederos and Downing is to do "advance work," i.e., to ascertain the threat level to a visiting VIP in order to determine the level of security required and how to cover the event. Having done the advance work, they notify Sergeant Pignone, the detail officer, how many officers they need to cover an upcoming event. Sergeants Mederos and Downing attend the events. At the events, they are responsible for determining where the officers will be placed, e.g., determining that there will be officers placed to cover the VIP's exit. They coordinate with the Cambridge Police Department. The Deputy Chief attends some but not all of the events.

#### Sergeant who handles criminal investigations

Sergeant David Burns, who also reports to Giacoppo, is in charge of criminal investigations. Burns reads police reports about crimes committed on the campus. He then determines, based on his professional judgment and experience, whether or not it would be worthwhile to invest the manpower in investigating the crime. This may depend on whether or not there are leads that may be followed up. For example, in the case of larceny of a laptop or bicycle, Burns considers whether there is a camera in the area that could identify a possible suspect. In the case of a stolen credit card, he may consider where the credit card has been used.

Six detectives are assigned to the criminal investigation department. Being a detective is a type of assignment for a police officer. The record does not reveal who determines or how it is determined which police officers will be assigned to work as detectives in the criminal investigation department. The detectives are assigned to geographic areas. The record does not reveal whether Sergeant Burns plays a role in assigning them to their geographic areas.

Once Sergeant Burns has decided to investigate a crime, he assigns the case to a detective. In making these assignments, he uses his judgment as to the nature of the crime and which detective would be best suited to investigate. Some detectives have skills that make them suitable for certain kinds of investigations. For example, he would use a certain detective to investigate a computer crime and another detective to investigate a sexual assault. Burns monitors the work of the detectives. He follows up with them in regular meetings and reads their reports to determine whether the cases have been solved or closed. If a crime or significant incident that may be a crime, such as a death, occurs during his shift, Burns and his detective report to the scene. Burns supervises the Department's property room and evidence room and is also responsible for coordinating any court prosecutions that result from the Department's investigations.

#### Sergeants who work in the Administrative and Finance Unit

Sergeant Martin Fay, whose title is Training and Internal Investigations, reports to Kerry Unflat, the Manager of Administration and Finance. Fay works at the HUPD

<sup>&</sup>lt;sup>17</sup> For example, the deputy prime minister of Israel had to have a "SWAT" detail available when she visited the campus due to threats to her.

facility at 1033 Massachusetts Avenue in Cambridge. Fay is in charge of training. He is the quartermaster for the department as well as the facilities manager. HUPD has announced that Fay will be the staff inspector for the department, although he has not yet assumed that role. The function of the staff inspector is to make sure that all of the Department's rules, policies, and guidelines are being followed. It is unclear whether any police officers report to Fay. <sup>18</sup>

Sergeant Daniel Twomey, whose title is Administrative Services, also reports to Unflat. Twomey is responsible for the overall quality of police reports. He reviews time off and the scheduling of overtime. He is also responsible for written "trespass" letters issued by the Department. The record does not reveal exactly what a trespass letter is, but Twomey is the contact person with respect to requests to see the Chief about having trespass warning letters removed. There is no evidence in the record as to whether or not any patrol officers report to Twomey.

#### The sergeants' role in hiring

When HUPD seeks to hire patrol officers, representatives of the University and HUPD Human Resources Departments screen the applications. Those candidates who pass the screening process are interviewed by a panel of individuals from HUPD. The interview panels include a sergeant, a patrol officer, and someone from Human Resources. The last hiring panel was composed of Deputy Chief Regan, HUPD's public information officer and director of strategic planning, HUPD's Human Resources officer, the president of the Patrolman's Association, and a sergeant. The panel makes a recommendation as to which candidates should go further in the process and which should be eliminated. In this regard, after each interview, each member of the hiring panel rates the candidate using a numerical score system, which is tabulated for the group. Candidates need a passing grade from the panel to go further in the process. For the last hiring, the panel interviewed 150 candidates for nine or ten positions. Sergeants and sometime patrol officers conduct background checks on those candidates who are recommended for hiring.

After the interviews by the hiring panel, the list of recommended candidates is forwarded to Chief Riley, who is the final arbiter. The record does not reveal whether the panel makes any specific recommendations beyond providing the scores of the candidates it recommends. The record does not reveal how many of the 150 candidates the panel interviewed were recommended to Riley for the nine or ten open positions in the last round of hiring, nor does the record reveal whether Riley followed the recommendations of the hiring panel. The record does not reveal whether Riley interviews the recommended candidates himself or whether he does any independent investigation of the suitability of the candidates beyond the scores or recommendations submitted by the hiring panel.

<sup>&</sup>lt;sup>18</sup> Regan did testified at one point that Sergeant Fay authorized overtime for Officer Sergey Vasilyev, who works in the administrative side of the house, so it is possible that a police officer reports to Fay.

#### The sergeants' role in grievance adjustment

The collective-bargaining agreement covering the police officers includes a grievance procedure under which employees are to present grievances at Step 1 to their "immediate supervisor." Regan testified that the sergeant on the shift that the officer works is the immediate supervisor for purposes of Step 1 of the grievance procedure. Regan testified that sergeants have the power to settle grievances at Step 1.

Although Regan has been the Deputy Chief or Chief of Staff for Operations since 1998, he testified that he is not aware of a single instance in which a sergeant settled a grievance at Step 1. He testified that he would not necessarily be apprised when sergeants handle grievances at Step 1 and that such grievances would likely involve a minor matter such as time off. Major issues would start at a higher level of the grievance process. Sergeants Chipman, Pignone, and Kotowski, who have worked in HUPD for many years, each testified that they have never been presented with any grievances themselves and are unaware of any sergeant ever adjusting a grievance. Chipman, who was the president of the Police Officer's union before he became a sergeant, was aware of no grievances adjusted by a sergeant during his time as union president.

#### The sergeants' role in discipline

HUPD's Policies and Guidelines Manual includes a progressive disciplinary system that includes counseling, verbal and written warnings, suspension, and termination. The Manual states that initial disciplinary action should be in the form of counseling, that supervisors are responsible for counseling employees, and that supervisors should document the counseling session in their notes for recollection at a later date. The manual states that if performance problems continue, or if the severity of the initial offense warrants, a formal verbal warning is the next step in the disciplinary process. If the problem persists after the verbal warning, a written warning should be issued. A suspension may be imposed for significant misconduct or repeated lesser infractions.

Regan testified that sergeants are responsible for counseling officers if they observe problematic behavior. Regan testified about a few instances in which a sergeant counseled an officer. In one case, a complaint was made that an officer on a paid detail had let someone sneak into a lacrosse game. The sergeant counseled the officer that this was against Department policy and he should not do it. In another instance, a sergeant counseled an officer who had taken some hockey pucks from the women's hockey team and told the officer to return the pucks. A sergeant counseled an officer for spending time on a public computer at one of the schools. Regan also testified that Sergeant David Burns counseled an officer who had repeatedly exceeded his allowance for cell phone minutes and that the officer paid for the minutes. In another incident, Sergeant Burns counseled an officer who failed to respond to a call while he was "on call," and the officer was docked for his on-call pay. Regan testified that Burns recommended the outcome in these last two cases, which were agreed upon by "the Deputy."

Sergeants have also asked Regan to participate in counseling sessions. In one instance, a sergeant had talked to an officer a couple of times but did not feel the message was getting through. The sergeant asked Regan to participate in a counseling session in which Regan met with both the sergeant and the officer, and Regan told the officer that his behavior could not continue.

Sergeant Wilmon Chipman testified that he does not believe he has authority to counsel employees. In a 2009 incident, Chipman e-mailed Deputy Chief Regan that he had investigated an incident concerning Officer Vasilyev and counseled him about inappropriate comments he made to a woman as he gave her a parking ticket. Regan replied, *inter alia*, in an e-mail submitted into evidence, "Additionally, before you made a determination of the punishment (counseling), this should have been run up the chain."

Sergeant Kotowski testified that if he knew an officer on his team was not carrying out orders or was not conducting himself properly, he would speak to the officer about it.

There is no evidence in the record to suggest that sergeants possess authority to issue verbal or written warnings on their own. Regan testified that sergeants have no authority to discharge or suspend employees or to order them to "go home" if they are unfit for duty. A January 2012 e-mail from Sergeant Denis Downing to all of the sergeants, described as "Operations Supervisor meeting notes," copied to Deputy Chief Claiborne, states, "If an officer is not fit for duty, the sergeant must contact Chief Riley via Deputy Claiborne before sending the officer home. Only the Chief is authorized to grant a leave of absence."

As for the sergeants' authority to recommend discipline, Sergeant Kotowski testified that, in his experience, when sergeants are assigned to investigate disciplinary issues, they review the facts and send a full report forward with a recommendation.

HUPD maintains procedures regarding the use of force by police officers. When an officer uses force during an incident, the sergeant on duty reviews the use of force and files a report in which he or she determines, based on his or her professional judgment whether or not force was used appropriately and within the HUPD guidelines. If the sergeant determines that the use of force was appropriate, the matter is closed, absent a complaint. If the sergeant determines that the officer's use of force was not appropriate, the Department follows up on the matter with the officer.

When a member of the community files a complaint against a police officer, e.g., about an officer's conduct during an arrest, the complaints are generally investigated by sergeants, who write a report. The University submitted into evidence two such reports. In one instance, Shift Commander Norma Rodriguez wrote a report to Deputy Chief Claiborne indicating her recommendation that the complaint was unfounded and the matter should be closed. Regan testified that no further action was taken. In the second case, Regan submitted a memo to Chief Riley indicating that he concurred with Sergeant

Fay's report that the officers involved acted in accordance with Department policy and the matter should be closed. 19 No further action was taken.

Similarly, sergeants review incidents in which a police officer is involved in an accident in a Department vehicle, and they file a report. If the sergeant's report indicates no negligence by the officer, the matter is closed. If the sergeant determines that the officer was at fault, there may be disciplinary action, depending on the nature of the accident and the damage.

#### The sergeants' role in investigating work-related injuries

When an officer is injured in the line of duty, a sergeant investigates and submits a report with their opinion as to whether the injury was sustained in the line of duty and whether the University should pay for the officer's medical bills. The University submitted into evidence a 2005 report, in which Sergeant Daniel Brown concluded that an officer's injuries were sustained in the line of duty. He recommended that her medical bills be approved and that she be approved for Industrial Accident leave, if needed. Regan testified that there was no challenge to the officer's claim thereafter.

#### Other statutory indicia

Sergeants have no authority to lay off, recall, promote, or reward officers or to transfer them from one shift to another.

#### Secondary indicia

Sergeants are salaried, and the pay of the current sergeants ranges from \$77,364 to \$91,184 per year. Patrol officer are hourly paid, and their pay ranges from \$46,530 to \$65,624 per year. Both sergeants and patrol officers are eligible for overtime pay, although sergeants are paid at a higher rate than the patrol officers for overtime. Most sergeants have their own offices or a private cubicle, while patrol officers do not have offices. Sergeants wear special insignia not worn by patrol officers, i.e., three stripes on their shirts, a gold badge, a gold hat band, and uniform pants with different piping. The sergeants in Operations meet every two weeks with Deputy Chief Claiborne to discuss operational procedures.

<sup>&</sup>lt;sup>19</sup> Fay's investigative report included a description of his interviews with each of the two officers who were the subject of his investigation. Fay wrote that he advised each officer that he was one of the subjects of an official investigation and, as such, the investigation could lead to disciplinary action. Fay also advised each officer that he was being ordered to answer all questions regarding his job performance truthfully and that if he refused to answer the questions, the officer could receive disciplinary action for such refusal that may well include termination.

#### **CONCLUSION**

Pursuant to Section 2(11) of the Act, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.* <sup>20</sup>

The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care*.<sup>21</sup> The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. *New Fern Restorium Co*.<sup>22</sup> The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co*.<sup>23</sup>

Harvard asserts that the sergeants are statutory supervisors on the basis of their authority to assign work and responsibly direct employees, to grant time off, to authorize overtime, to discipline employees, to adjust grievances, and because of their role in the hiring process. I find, in agreement with Harvard, that the sergeants are Section 2(11) supervisors on the basis of all of those indicia, with the exception of their role in the hiring process.

## Sergeants' role in assignment and responsible direction of police officers

In *Oakwood Healthcare, Inc.*, <sup>24</sup> the Board refined its analysis of the terms "assign," "responsibly direct," and "independent judgment" in assessing supervisory status. The Board announced that it construes the term "assign" to refer to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee."

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<sup>&</sup>lt;sup>20</sup> 273 NLRB 1677, 1689 (1985).

<sup>&</sup>lt;sup>21</sup> 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

<sup>&</sup>lt;sup>22</sup> 175 NLRB 871 (1969).

<sup>&</sup>lt;sup>23</sup> 308 NLRB 101, 102 (1992).

<sup>&</sup>lt;sup>24</sup> 348 NLRB 686 (2006).

<sup>&</sup>lt;sup>25</sup> Id. at 689.

With respect to "responsible direction," the Board explained in *Oakwood* that, if a person has "men under him" and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both "responsible" and carried out with independent judgment. For direction to be "responsible," the person directing the oversight of the employee must be accountable for the performance of the task by the other. To establish accountability, it must be shown that the employer delegated to the putative supervisors authority to direct the work and take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisors if they do not take these steps. <sup>26</sup>

Finally, the Board held in *Oakwood* that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the function is exercised. "[T]o exercise independent judgment, an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." [A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." The Board also stated that the degree of discretion exercised must rise above the "routine or clerical."

<u>Sergeants</u>' role in the assignment of officers to a place or overall tasks and their role in responsibly directing police officers

Harvard has failed to establish that the sergeants' role in the annual assignment of Operations officers to geographic areas or to dormitories confers supervisory status. Deputy Chief Claiborne makes the final determination with respect to assignment to geographic teams. The fact that Claiborne does so "through consultation with the sergeants" is insufficient to demonstrate that the sergeants effectively recommend the geographic assignments. Harvard introduced no evidence that the sergeants' recommendations for geographic assignments are routinely followed. To the contrary, Sergeant Kotowski testified that there may be changes to each team sergeant's request when the teams are finalized by a higher level of management.

I find, however, that the sergeants use independent judgment in the daily assignment of work to officers and in responsibly directing them. Some of the sergeants

<sup>&</sup>lt;sup>26</sup> Id. at 689-692.
<sup>27</sup> Id. at 693.

<sup>&</sup>lt;sup>28</sup> Id.

<sup>&</sup>lt;sup>29</sup> Id.

determine whether police officers will be hired to fill a paid detail and, if so, how many officers. In this regard, the detail officer, Sergeant Pignone, assesses construction sites, for example, to determine if there is a hazardous condition warranting a paid detail. Sergeants Mederos and Downing, who are responsible for the security of visiting dignitaries and VIPs, coordinate with other security groups to ascertain the threat level to a visiting dignitary or VIP and determine how many officers will be hired for a detail to cover an upcoming visit. Although the determination of which officers will work the details is governed by the collective-bargaining agreement, I find that these sergeants exercise independent judgment in determining, in the first instance, how many officers will be needed for these paid details.

Similarly, Sergeant Burns in the Criminal Investigation group uses his professional judgment and experience to determine whether there are enough leads in a given criminal case to warrant the investment of the manpower to investigate it. Burns then considers the relative skills of his detectives when he assigns the investigations to them. In this regard, he assigns certain types of cases, such as sexual assaults or computer crimes, for example, to those detectives best suited to investigate them. I find that this requires independent judgment.

Finally, I find that the sergeants in Operations exercise independent judgment in the daily deployment of the police officers. Sergeants may redeploy officers from one geographic sector to another, for example, in response to a protest in Harvard Yard or due to the need for crowd control. They may send an officer to handle a problem at one of the dorms or to a meeting or to respond to a call about a sexual assault. Regan testified that the sergeants consider who would do the best job in each of these areas or, e.g., who has had the requisite training in handling sexual assault cases. On rare occasions, the sergeants in Operations have determined whether to call off or continue a high speed chase, requiring a determination as to whether, in their professional judgment, the chase has become unsafe. On a daily basis, the sergeants determine which officers will patrol by vehicle, on foot, or by bike and which will man a stationary post. They may also make some assignments that the police officers deem undesirable, such as to ride with a non-HUPD police officer. *Oakwood Healthcare*, *Inc.* <sup>30</sup> (power to assign an employee to "plum" or "bum" assignments is of importance to both employees and management).

With respect to the sergeants' accountability for the performance of the police officers, there is evidence that, on one occasion, a sergeant was suspended for not following through on his supervisory duties when a police officer next to him eavesdropped on a phone call. Thus, the record demonstrates that sergeants are held accountable for the performance of their subordinates.<sup>31</sup>

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<sup>&</sup>lt;sup>30</sup> Id. at 689.

<sup>&</sup>lt;sup>31</sup> In concluding that Harvard has demonstrated the requisite accountability, I do not rely on the proffered evidence concerning other instances in which sergeants were disciplined, as all of them involved discipline of sergeants because of their own misconduct rather than because of the misconduct of their subordinates. *Oakwood Healthcare, Inc.*, Id. at 695 (instance where the Employer disciplined a charge nurse for failing to make fair assignments shows only that the

#### Sergeant's role in assigning police officers to a time

There is no contention that sergeants play a role in determining the usual shifts or days of the week worked by the police officers, which is a matter governed by a bidding process set forth in the collective-bargaining agreement. I find, however, that the sergeants' role in granting time off to the police officers confers supervisory status. In this regard, the sergeants have authority to grant the police officers' requests for vacation days, requests to leave early, and requests to swap shifts, without consulting their superiors, so long as the request for time off is made with more than 24 hours notice and does not impact minimum staffing requirements. *Bredero Shaw*<sup>32</sup> (lead/charge hand's supervisory authority was corroborated by evidence that, on at least one occasion, he granted an employee's request for time off).

I decline to find that the sergeants are supervisors on the basis of their role in authorizing voluntary overtime. Although Regan testified about one occasion in which a sergeant in the administrative group authorized overtime on his own, Sergeant Chipman in Operations, where the preponderance of the sergeants work, testified that overtime in that group must be authorized by Deputy Chief Claiborne. Sergeant Kotowski's testimony suggested that sergeants in Operations have a standing authorization to offer overtime if the numbers fall below the minimum staffing levels dictated by the Deputy Chief, but it would require no independent judgment to exercise such authority, which is constrained by pre-determined staffing levels. I note that sergeants have no control over the selection of officers for voluntary overtime work, which is dictated by the collective-bargaining agreement.

As for the sergeants' authority to require overtime work, it is well established that supervisory status may be established by a showing that the putative supervisor has the ability to *require* that a certain action be taken rather than authority to merely *request* that a certain action be taken. *Golden Crest Healthcare Center*. Here, the evidence with respect to the sergeants' authority to order officers from a previous shift to stay over is in conflict. Thus, Regan testified that, if no police officer volunteers to accept a needed overtime shift and the situation requires it, sergeants may order an officer to stay over for another shift. According to Regan, the selection of the officer required to stay over is totally within the prerogative of the sergeant and may depend on how many hours the officer has already worked or is scheduled to work the following day. Sergeant Chipman testified, on the other hand, that there have been situations where he had to hold an officer over for another shift but that he did so only after consulting the Deputy Chief. It is unclear from the record why Chipman checked with the Deputy Chief first and,

charge nurses are accountable for their own performance, not the performance of others, and is insufficient to establish responsible direction).

<sup>&</sup>lt;sup>32</sup> 345 NLRB 782, 783-784 (2005).

<sup>&</sup>lt;sup>33</sup> 348 NRLB 727, 730 (2006).

although the matter is not completely free from doubt, I find, based on Regan's testimony, that sergeants have authority to require police officers to stay at work for an extra shift. This power confers supervisory status.

#### Sergeants' role in discipline

It is well established that, in order for discipline by an individual to confer supervisory status, the discipline must lead to personnel action without independent investigation or review by other management personnel. *Franklin Home Health Agency*;<sup>34</sup> *Beverly Health and Rehabilitation Services*.<sup>35</sup>

Here, Harvard has established that it has a formal progressive disciplinary system under which employees receive progressively more serious discipline for additional violations of Harvard's rules and policies, beginning with counseling and eventually leading to termination. The Board has found that counseling forms or coachings are a form of discipline if they lay a foundation, under a progressive disciplinary system, for future discipline against an employee. Individuals who issue counseling under such a system would be found to possess supervisory authority under Section 2(11) of the Act. *Oak Park Nursing Care Center*; <sup>36</sup> *Promedica Health Systems*. <sup>37</sup>

There was conflicting evidence in the record concerning the sergeants' authority to counsel police officers without review by higher managers. In one instance in 2009, Deputy Chief Regan e-mailed Sergeant Chipman that a disciplinary matter should have been "run up the chain" before Chipman determined to counsel Officer Vasilyev. On the other hand, Regan testified about three instances in which a sergeant counseled an officer on his own and about two other instances in which it appears that Sergeant Burns effectively recommended counseling, along with a monetary consequence for misconduct (being required to pay for excess cell phone minutes and being docked for on-call pay). Sergeant Kotowski conceded that he would speak to an officer who was not conducting himself properly. I find that the preponderance of the evidence shows that sergeants possess authority to counsel or effectively recommend counseling. Because, under HUPD's progressive disciplinary system, counseling may lay the foundation for future discipline, this authority is sufficient to confer supervisory status.

I find, additionally, that the sergeants effectively recommend discipline by virtue of their role in investigating and filing reports with recommendations concerning the police officers' use of force, complaints against police officers, and police officers' accidents in department vehicles. As Sergeant Fay's report made clear, police officers

<sup>35</sup> 335 NLRB 635, 664 (2001), enfd. in pertinent part, 317 F.3d 316 (D.C. Cir. 2003).

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<sup>&</sup>lt;sup>34</sup> 337 NLRB 826, 830 (2002).

<sup>&</sup>lt;sup>36</sup> 351 NLRB 27, 28-29 (2007).

<sup>&</sup>lt;sup>37</sup> 343 NLRB 1351 (2004).

face the possibility of discipline in such cases. The record reflects that, as a result of the sergeants' investigation and recommendation in several such cases, police officers were exonerated and no disciplinary action was taken against them.

#### Sergeants' role in adjusting grievances

The Board has held that an individual's role as the representative of the employer with respect to the first step of a contractual grievance procedure may demonstrate supervisory authority. *Comprehensive Health Planning Council.*<sup>38</sup> Here, the sergeants are Harvard's representative at the first step of a formal grievance procedure, as set for in its collective-bargaining agreement with the police officers' union. This further supports a finding that they are statutory supervisors.

#### Sergeants' role in the hiring process

Contrary to Harvard's assertion, the sergeants' role in interviewing job applicants does not demonstrate that they effectively recommend hiring, and I do not rely on it in concluding that the sergeants are statutory supervisors. A sergeant and a police officer are included among a group of individuals, including superiors and supervisors such as Deputy Chief Regan and a representative from Human Resources, who interview and rate candidates for police officer positions. The Board has held that mere participation in the interview process does not confer supervisory status, where others who are admitted supervisors also participate and thus independently investigate the suitability of the candidates. *J.C. Penney Corp.*; \* Los Angeles Water & Power Employees' Assn.; \* Ryder Truck Rental, Inc.; \* California Beverage Co.\* I note that there is no contention by Harvard that the police officers' participation in this process, which is identical to that of the sergeants, confers supervisory status on them.

Further, Harvard has presented no evidence that the sergeants make any specific recommendations to Chief Riley beyond providing group scores for each candidate and no evidence that Riley routinely follows the recommendations, if any, of the interview panel. Nor does the record show whether Riley does follows the recommendations without conducting an independent investigation of the candidates by interviewing them himself. In the absence of such evidence, Harvard has failed to meet its burden.

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<sup>&</sup>lt;sup>38</sup> 256 NRLB 1191, 1192 (1981).

<sup>&</sup>lt;sup>39</sup> 347 NLRB 127, 129 (2006).

<sup>&</sup>lt;sup>40</sup> 340 NLRB 1232, 1233, 1234-1235 (2003).

<sup>&</sup>lt;sup>41</sup> 326 NLRB 1386, 1387-1388 fn. 9 (1998).

<sup>&</sup>lt;sup>42</sup> 283 NLRB 328, 329 (1987).

#### Secondary indicia

In addition to evidence that sergeants possess primary statutory authority to assign, responsibly direct, and discipline police officers, and to adjust their grievances, various secondary indicia lend additional support to a finding that they are supervisors.

Significantly, the ratio of supervisors to employees supports a finding that the sergeants are supervisors. I note that the lieutenants, who at one point provided a middle layer of management in HUPD, have all been laid off since 1999. If the sergeants are found to be employees, the department would have only four statutory supervisors (Chief Riley and three deputy chiefs) supervising 77 employees, an unrealistic scenario in a setting such as a police department, where the work is far from routine in nature.

The fact that the sergeants are salaried rather than hourly paid, receive significantly higher pay than the police officers, have their own offices or cubicles, wear distinct insignia on their uniforms, and participate in regular management meetings with the Deputy Chief all support a finding of supervisory status.

#### **ORDER**

IT IS HEREBY ORDERED that the petition is dismissed.

#### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by June 14, 2012. The request may be filed electronically through the Agency's website, <a href="www.nlrb.gov">www.nlrb.gov</a>, 1 but may <a href="mailto:not\_befiled">not\_befiled</a> by facsimile.

**DATED**: May 31, 2012

/s/ Rosemary Pye

Rosemary Pye, Regional Director First Region National Labor Relations Board Thomas P. O'Neill, Jr. Federal Building 10 Causeway Street, Sixth Floor Boston, MA 02222-1072